United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 74-2431

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

P/S

NO. 74-2431

CIVIL AERONAUTICS BOARD,

Appellee,

v.

CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS;

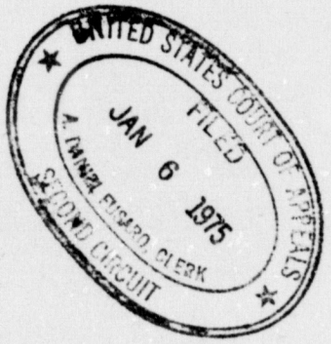
SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY;

ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN,

Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR APPELLANTS



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January 6, 1975

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CIVIL AERONAUTICS BOARD, Appellee, v. CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS; SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY; ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN, Appellants.	Case No. 74-2431

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CIVIL AERONAUTICS BOARD, Appellee, v. CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS; SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY; ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN, Appellants.	Case No. 74-2431

STATEMENT OF ISSUES

The Civil Aeronautics Board's brief has presented an additional question: Do Appellants have standing to assert the unconstitutionality and illegality of the affinity charter regulations?

Appellants' reply brief will address this issue first. The replies to the Board's remaining arguments then follow the order of Appellants' direct brief.

I. INTRODUCTION

A. The Public Interest

The Civil Aeronautics Board attempts to portray Appellants as villainous black marketeers whose services are inconsistent with the public interest and

the welfare of the airline industry. The difficulty with this portrait is that it is untrue and, therefore, unpaintable. First, the record establishes that Appellants make low-cost air transportation available to the public on a consistent and reliable basis. Second, the evidence shows that Appellants have never violated any commitment made to a passenger. Third, rather than injuring the scheduled airline industry, they have contributed to its financial well-being. In this regard, the following statement by the Board is false: "The precarious financial condition of certain scheduled carriers is not without significance. . ." (Appellee's br. p.30). Without exception, the domestic trunkline industry is operating profitably. Indeed, that industry has been realizing record-breaking profits. During the first nine months of 1974 that industry earned $411,000,000 net compared to $207,000,000 in the same 1973 period.[1/] Pan American World Airways, in contrast, experienced losses in 1974, but the only activity which proved profitable to Pan Am was its performance of charter air transportation. No air carrier sought to intervene in this proceeding to assert that the business of Appellants was injurious to its financial interests. In short, the government's argument that it is protecting the scheduled industry from economic hazards is made of whole cloth.

The Board's contention that Appellants generate pressures on others to act unlawfully is not merely unsupported by the record, but, if not contained in a brief, would border on libel. The government's conjecture has no place here.

1/ Source: CAB form 41 Reports.

We do agree, however, that a strong public interest exists in insuring a regulatory scheme which is responsive to the interests of both the public and the airline industry. We insist that this objective need not and, indeed, may not be achieved by discriminatory regulations which result in public injury rather than public benefits.

Millions of Americans travel annually on low-cost charter transportation. Millions more would be afforded that opportunity if discrimintory, unenforceable and unworkable regulations were to be abolished and the law were to be administered in an even-handed fashion. Therein lies the public interest.

B. Inaccuracies of Appellee's Statement Of Facts

In its answering brief, the government has introduced certain factual and legal points which are both inconsistent with the record herein and the CAB regulations to which Appellants allegedly must adhere. For purposes of brevity, we will merely quote the government's statements and follow with a listing of the inaccuracies that attend thereto.

1. "The regulations applicable to affinity charters do not allow for the involvement of anyone whose function may be described as a 'wholesaler' or 'tour operator' of affinity air transportation. [footnote omitted]" (Appellee's br. p. 6).

Nothing in the regulations prohibits the involvement of wholesalers or tour operators in affinity air transportation. Indeed, the requirement that the chartering organization identify any "intermediary" in its Statement of Supporting Information filed with the Board would suggest acquiescence by the

Civil Aeronautics Board in tour operator or wholesaler participation in charter activity. That implication is strengthened by the fact that prior to 1963 all "intermediaries" had to warrant the bona fides of charters. Perhaps the Board deregulated "intermediaries" because it recognized that it had no legal authority over persons who do not either provide or procure air transportation for a fee. Thus, the Board must have realized that it has no jurisdiction over a hotel company which sells accommodations where matching air transportation is obtained from a travel agent or direct air carrier. In any event, the Board has disavowed regulatory control over "intermediaries".

2. "Prior to the performance of a charter flight the carrier, charterer, and travel agent (if any) must execute a 'Statement of Supporting Information' in which they must name any 'intermediary' involved in its arrangement, describe the charter in detail and warrant their compliance with the applicable Board regulations. [footnote omitted]" (Appellee's br. pp. 7-8).

This statement is not true. The Statement of Supporting Information at the end of Part 207 of the Board's Economic Regulations requires the charterer -- and only the charterer -- to name any intermediary. (See Statutory Appendix to Appellants' br. p. 12(a)). None of Appellants here are charterers or are alleged to be such.

3. "Carefree/Vacation Ventures would then forward to Liberty Travel a packet of travel documents for the customer, including a membership card in some organization for the customer and a boarding pass for the aircraft. (J.A. 45)." (Appellee's br. p. 10)

Not only is this statement untrue, but the government knows it to be so. Its

witness from Liberty Travel testified that he had no knowledge that Appellants Carefree/Vacation Ventures ever sent membership cards to his company for passengers signed-up for affinity charters.[1/] Despite this knowledge, the government is seeking to perpetuate the erroneous finding of fact made by the District Court as a consequence of the misjoinder which confused the evidence directed at Carefree/Vacation Ventures with that adduced as to defendant Gil International Tours, Ltd.

4. "Pike secures the reserved space by paying the charter price of the aircraft to Surrey in advance (Pike Test., pp. 101-105; Add. 62a-66a)." (Appellee's br. p. 12).

There is no statement in the transcript by anyone that Pike paid Surrey "in advance".

5. "In response to 'Question 12' on the 'Statement' requiring identification of 'any intermediary involved in the charter', Surrey answers: 'None' (Id.)" (Appellee's br. p. 13).

Surrey did not execute any answer to "Question 12" because this is the section of the Statement of Supporting Information to be executed by the chartering organization rather than the agent. The citation of the government to J.A. 52 is 180 degrees to the contrary. In short, the government has mis-cited its authority.[2/]

6. "Together [Pike and Surrey] they reserve bulk air transportation which they sell to affinity groups and individuals through retail travel agencies at a price fixed by Pike (J.A. 50-51)." (Appellee's br. p. 26).

1/ See Tr. July 18, pp. 76 et seq.

2/ Also see Add. to Appellee's br. p. 30a

This is an attempt to create the false impression that Pike and Surrey do business in concert. The citation merely states that Pike reserves its space "through Surrey and sometimes through other travel agents." As Appellants' brief points out, Ernie Pike Associates, Ltd., and Surrey do not act in concert and conduct business at arms length. (Appellants' br. p. 42). North American Airlines v. CAB, 240 F. 2d 857 (C.A.D.C. 1956) cert. denied, 353 U.S. 941 (1957), is most inappropriate in the premises. The airlines engaged in that joint enterprise were owned and controlled by the same group which formed interlocking relationships between ostensibly independent entities. No such evidence has been presented here.

II. THE SUBSTANTIVE ISSUES

A. Appellants Have Standing To Assert The Unconstitutional And Unjustly Discriminatory Nature Of The Affinity Charter Regulations.

The government's attack on Appellants' standing to raise the unconstitutionality and unjust discrimination inherent in the affinity charter classification is based on the ground that they cannot be injured by those legal and constitutional deficiencies. (Appellee's br. p. 34). To state this proposition is to refute it. The very existence of this suit belies the assertion that Appellants do not "claim injury".

Despite the Board's citation of authorities, Griswold v. Connecticut, 379 U.S. 926 (1965), is the law on this subject. There, a doctor was convicted of prescribing contraceptive devices for his patient. The state law prohibited use of such devices. The Supreme Court found that his conviction was

unlawful on constitutional grounds, holding that he had standing to assert the constitutional rights of his patients, since the doctor himself had been convicted of violating the law. The Appellant was thus able to assert the rights of others, where he was clearly injured in fact by prosecution under an unconstitutional statute.

Appellants stand in the shoes of Dr. Griswold; first, they do "claim injury" from the unconstitutionality and illegality of the affinity regulations; the limitation on eligibility for affinity charters clearly deprives Appellants of economic benefits obtainable if persons not belonging to affinity groups were allowed equal access to charter air transportation. Second, Appellants themselves are being charged with violations of such regulations. If the Board wishes to concede that the regulations are not applicable to Appellants, the latter will quickly concur! Third, Appellants are not asserting the rights of third parties. They are asserting their own right to engage in business without the shackles of government-imposed discriminatory practices.

Even if they were asserting the rights of third parties, they may do so in accordance with Griswold and such cases as Barrows v. Jackson, 346 U.S. 249 (1953), and NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951), which hold that standing to assert the rights of third parties is often accorded a defendant charged with violation of the law.

It is hornbook doctrine that, once standing to appeal is established, any and all legitimate contentions may be advanced by an appellant. Thus Professor Davis states:[1/]

1/ 3 Davis, Administrative Law (1958) §22.07

> "The crucial difference is the difference between initiating a proceeding -- setting the judicial machinery in motion -- and calling to the court's attention something that the court may do on its own motion. The principle is that the party always has standing to call to a tribunal's attention (whether court of agency) the illegality of a course of action which the tribunal is contemplating."

The cases cited by the government are not to the contrary, nor are they in point. O'Shea v. Littleton, 414 U.S. 488, 493-496 (1974), does not even deal with the issue of standing. There, the court noted the absence of a "case or controversy" within the meaning of Article III of the Constitution, since no plaintiff had specified a particular injury to himself. Schlesinger v. Reservists Committee To Stop The War, 94 S.Ct. 2925 (1974), held only that a representative of a class has no standing to assert an injury which is common to every citizen of the United States. Arnett v. Kennedy, 416 U.S. 134, 163-164 (1974), did not turn on standing to assert the rights of others, because the court found that there was no constitutional right whose violation injured either the plaintiff or third parties. Significantly, none of these cases deal with the ability of a defendant to raise issues in defense to threatened enforcement.[1/]

B. The Government Has Failed To Show The Legality Of Affinity Charters Under Either Section 404 Of The Federal Aviation Act or the Fifth Amendment To The U.S. Constitution.

I. The Board Itself Has Precluded The Use Of Factors Related To The Status Of The Traffic.

The sole reason offered by the government for justifying the availability of low-cost charter transportation to "affiliated" persons while denying it to others is as follows:

1/ Nor does the law review note cited by Appellee.

> "The affinity requirement. . .serves to prevent the catastrophic degree of diversion from regular fares which would occur if low-fare groups could be freely formed from unaffiliated, individual members of the general public." Appellee's br. p. 35).

It is a well-established axiom of modern psychology that if an untruth is repeated with sufficient frequency, it will be believed. This effective technique has been employed by others than the Civil Aeronautics Board with significant success. However, this Court must evaluate the facts, not the government's suppositions. Since 1938 the Board has not attempted, much less prepared, a single study to demonstrate that non-discriminatory charters would divert rather than stimulate regularly scheduled traffic. Indeed, the Civil Aeronautics Board itself has proposed non-discriminatory charters in the form of travel group charters and inclusive tour charters. To be sure, these latter forms have been utter failures due to regulatory mismanagement. Nevertheless, it is the Board's belief at this time that a non-discriminatory charter can operate side-by-side with regularly scheduled service without impairing the latter. In short, unjust discrimination is not a necessary concommitant of a sound system of air transportation. To the contrary, it cuts across the grain of the egalitarian principles central to the regulatory structure.

National Air Carrier Association v. CAB, 442 F. 2d 862 (C.A.D.C. 1971), is clearly distinguishable from the instant case. In that proceeding, the court found that scheduled group affinity fares were not unjustly discriminatory because they were required to minimize diversion from higher scheduled fares. This finding was made on the Board's assertion that such discrimin-

atory classification was necessary. In other words, the court relied upon the Board's then views on what constitutes unjust discrimination and what does not. However, since NACA v. CAB, the Board has altered its interpretation in accordance with the dictates of Transcontinental Bus System v. CAB, 383 F. 2d 466 (5th Cir. 1967), and Trailways of New England v. CAB, 412 F. 2d 926 (1st Cir. 1969). Those cases established the rule that discount fares could not be offered to persons on the basis of their age or family classification. Thereafter, the Board conducted its wide-ranging Domestic Passenger Fare Investigation which included consideration of discount fares. After three years of intensive hearings, the Board concluded that, irrespective of economic considerations such as "diversion", discriminatory fares based upon the status of the traffic were unlawful. It addressed itself to this issue as follows:

> "Thus, factors related to the status of the traffic and unrelated to transportation may not be considered in justification of a discriminatory fare, nor are we empowered to take into consideration matters involving broad social policies, such as special treatment for any particular age group, or encouragement of families as a favored social grouping, whatever our personal views may be on such policies." (Order 72-12-18, p. 63, December 5, 1972).

The principle stated in that proceeding is applicable here because the affinity rules provide unjust discrimination on the basis of social grouping. The Board may seek to ignore its own precedents in this case; this Court may not because, as that same Board never tires of stating, an administrative agency's interpretation of its own powers is entitled to great weight.

If NACA v. CAB, supra were to be decided today, the court would find that group affinity scheduled fares were unjustly discriminatory for the same reason that they found to the contrary earlier, namely, the Board's expertise.[1/] As that expertise developed through experience, the Board recognized that discriminatory fares based upon status were unlawful. We respectfully suggest that the Board should have acknowledged this legal truism before Transcontinental Bus System v. CAB, supra, Trailways of New England v. CAB, supra, and NACA v. CAB, supra. In any event, it has finally recognized that the anti-discrimination provisions of the statute prohibit the establishment of fare classifications based upon the status of the traffic.

The absurdity of Appellee's justification for the affinity rules is self-evident. If the Board were able to order the introduction of otherwise unjustly discriminatory or unduly preferential fares simply because such fares would be beneficial to airlines by preventing diversion from higher fares, the prohibition against discriminations and preferences would be meaningless. To illustrate the possible consequences, the Board could order reduced fares for black persons on the ground that such fares might attract passengers to the airlines who otherwise would not fly. Such a fare would simultaneously protect the integrity of other fare classifications because non-blacks, who constitute the large majority of U.S. citizens, would be compelled to continue traveling at higher fares. Analogies can be drawn from any classification of

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1/ The two earlier Board orders cited by Appellee along with NACA reflected the same now-rejected reasoning.

traffic based upon status. But any such classification would fly in the face of the statutory prohibitions against unjust discrimination and undue preference.

For the same reasons, the Board's affinity rules affront the equal protection guarantee of the Fifth Amendment. This guarantee is no less broad than that contained in Section 404(b) of the Federal Aviation Act. To the contrary, it is far broader. Discrimination which is not necessary or in tune with the statutory objective must be decreed violative of equal protection of the law.

2. Apart From Transportation-Related Considerations, Congress Has Excluded Affinity Passengers From The Classes Of Traffic Entitled To Rate Preferences Based On Status.

Congress has determined that the rule of equality should be the "very core and essence of the fare structure in the transportation industry". Transcontinental Bus System, Inc. v. CAB., supra. It has permitted deviation from that rule only where it was convinced that social or economic policy indicated a need for rate concessions to a particular category of persons. Congress specifically listed the favored categories in Section 22 of the Interstate Commerce Act,[1/] and Section 403(b) of the Federal Aviation Act,[2/] which govern eligibility for reduced fares on railroads and airlines, respectively.

1/ 49 U.S.C. §22

2/ 49 U.S.C. §1373; this section governs tariff rules and rates, while Section 404(b), 49 U.S.C. §1374(b), prohibits unjust discrimination.

Section 22 of the Interstate Commerce Act permits free and reduced rate transportation to be provided to a large number of groups such as "destitute and homeless persons," government employees, ministers of religion, servicemen , and blind and disabled persons.

When Section 403(b) of the Civil Aeronautics Act, predecessor to the Federal Aviation Act, was enacted, Congress adopted a much more restrictive view of the classes of persons who should be permitted to receive free or reduced air transportation. Only carrier employees, crash victims, and ministers have been included. Section 403(b) represents the carefully considered judgment of Congress on the matter of rate privileges for special groups.

The legislative history of Section 403(b) conclusively demonstrates that no classes of persons other than the classes listed in the statute may be granted free or reduced rate air transportation unless the free or reduced rate is based upon transportation-related considerations, such as cost of service or value of service. As shown above, such a finding cannot be made today, in light of the Board's ruling in the Domestic Passenger Fare Investigation, supra.

C. Appellee's Attempt To Bring Appellants Under The Regulatory Umbrella Is Unsupportable.

Appellee contends that Appellants are responsible for enforcing and adhering to the affinity regulations. However, it ignores the regulatory history which clearly illustrates that "intermediaries" such as Carefree and Ernie Pike have been deregulated by the Civil Aeronautics Board. Surrey, a travel agent, is only regulated to the extent that it is prohibited from receiving double compensation and is required to fill out a form called "State-

ment of Supporting Information."

Appellee maintains, despite this history, that Appellants are subject to the affinity regulations because they are responsible as agents for the acts of air carriers. (Appellee's br. p. 20). As to the intermediaries Carefree and Pike, this contention has no validity inasmuch as these parties have no connection with airlines. They do not purchase air transportation for their own account, nor do they act as travel agents. They have no privity of contract with the airlines. Insofar as Surrey is concerned, it acts as an agent for airlines. But in this capacity, it cannot be held liable for the acts of its alleged principals. Thus in International Trading Corporation v. Edison, 109 F. 2d 825, (D.C.Cir. 1940), cert. denied, 310 U.S. 652, it was held that where an obligation is that of a principal, a court cannot enforce the obligation against the agent. To the same effect, see Marcus Loew Booking Agency v. Princess Pat. Limited, 141 F. 2d 152 (7th Cir. 1944); Shilman v. U.S., 164 F. 2d 649 (2nd Cir. 1948), cert. denied, 333 U.S. 837; Wilson v. Melgrath Supply & Gasket Co., 45 F. Supp. 748 (D.C. Pa. 1942); Gallagher v. Merritt-Chapman & Scott Corp., 86 F. Supp. 10 (D.C.N.Y. 1949). Appellee's reliance upon World Airways, Inc. v. Northeast Airlines, Inc., 349 F. 2d 1007 (1st Cir. 1965), cert. denied, 382 U.S. 984 is misplaced. There, the agent was not merely an agent but was also a principal who was acting in concert with another principal, forming an "unholy alliance" with an air carrier, in Judge Breitenstein's words. That is not the case here and no evidence has been introduced even to suggest that Appellants have acted in conjunction with air carriers.

D. Appellee Has Failed To Justify The Injunction As A Reasonable Form of Relief.

Appellants have continuously maintained that the terms of the injunction are vague, impractical of implementation, and unduly burdensome. (Appellants' br. pp. 24-26). The government's response is limited to the following assertions:

(1) That Appellants are in a position to know all parties involved, and to ensure that a charter has been performed in accordance with the regulations; and

(2) That application may be made to the District Court for clarification of any term of the injunction Appellants do not understand. (Appellee's br. p. 32).

As to the vagueness problem, Appellants attempted to obtain clarification in their motion objecting to the issuance of the initial injunction. Their efforts were to no avail.

With respect to the burdensome nature of the injunction, it must be noted that Appellants cannot enforce the charter regulations as directed by the District Court. They have no access to a chartering organization's central membership list, and therefore, cannot compare that list with a charter manifest. Surrey has no knowledge of who is marketing the charter or the nature of the advertising for such charter or the manner in which passengers are solicited. Carefree and Pike are not aware of the bona fides of the chartering organization, any more than is Surrey. They also have no knowledge of how the traffic is solicited by retail agents or others. None of the Appell-

ants can possibly know whether the air carrier has granted rebates to the chartering organization. Yet, the District Court and the government would impose total responsibility upon these parties for insuring compliance with the charter regulations, although those regulations specifically assign that duty to the air carrier. This is a wholly inequitable result.

E. Appellee Has Misstated The Standards For Overturning A Preliminary Injunction.

Essentially, the government maintains that a court of appeals should not reverse a district court's grant of a preliminary injunction unless the latter abused its discretion or ignored some fundamental principle of equity (Appellee's br. p. 24). This is not the law. Appellee cites Deckert v. Independant Shares Corp., 311 U.S. 282 (1940). That case held that an injunction issued by a district court would not be distrubed in the absence of an abuse of discretion where it was designed to preserve the status quo pending a final determination of the merits. (Id. at 290). The same situation obtained in Packard Instrument Co. v. ANS, Inc., 416 F. 2d 943 (2nd Cir. 1969). Here the situation is the reverse; the District Court would disturb the status quo and impose burdens upon Appellants which would drive them out of business.

The law under these circumstances, as observed by Judge Judd (J.A. 64), is that a court should hesitate to grant a preliminary injunction which would destroy a business, R.F.D. Group, Ltd. v. Rubber Fabricators, Inc., 323 F. Supp. 521, 528 (S.D.N.Y. 1971).

Moreover, as Judge Judd also noted, as Appellee fails to state, the

public interest is always a matter to be considered in the grant or denial of a preliminary injunction. (Ibid.). Here the public interest weighs heavily in favor of the continuation of non-discriminatory charter operations by Appellants and others. In this regard, we are only urging that the law be enforced -- the higher law that forbids discrimination, preference and prejudice. The failure to consider either the public interest in the provision of low-cost charter transportation or the harm to the Appellants by having their businesses destroyed constitutes an abuse of discretion. Even absent an abuse of discretion, it should be noted that an injunction would not lie here under the appropriate judicial standards set out in Appellants' brief (pp. 27-31).

III. THE PROCEDURAL ISSUES

A. The Reference To The Magistrate By The District Court Judge Is A Matter Which May Be Raised On Appeal.

Two strenuous objections were lodged to the District Court order of reference. The Board's objection is mentioned in its brief (p. 40). Defendant below, Nationwide Leisure Corporation, joined in this view to no avail. (Tr. July 23, pp. 3-6). Now, the government urges that these Appellants are not entitled to a hearing before a District Court Judge because they did not ape the objections of the government and defendant Nationwide Leisure.

Apparently, the government does not fully appreciate the reason underlying the necessity for making objections before a trial court. That reason is to afford the District Court the opportunity to correct erroneous rulings.

Thus, as this Court held in Steinhauser v. Hertz Corp., 421 F. 2d 1169 (1970), the purpose of the rule requiring objections is to prevent reversals and consequent new trials because of errors the judge might well have corrected if the point had been brought to his attention. In this case, it was forcefully presented to the District Court judge that his referral of the evidentiary hearing to a Magistrate was not proper. A court is not an echo chamber wherein each party must rise to his feet at every objection to state "I join".

Appellee argues that, even if error occurred by referral of this case to a magistrate, such error was harmless because the magistrate ruled against issuance of a preliminary injunction and, in any event, the District Court made the key findings (Appellee's br. pp. 39-40). The short answer to this argument is that, if the District Court itself had conducted the proceeding and heard the evidence, it would have determined that a preliminary injunction should not issue.

B. The Prejudicial Misjoinder Is Not Cured By Use Of The Same Witness Against A Number Of The Defendants.

Appellee misses the mark when it asserts that an otherwise prejudicial misjoinder is cured by the fact that a single witness would be required to testify regarding activities of several misjoinded defendants. The issue in assessing whether a joinder of multifarious defendants is improper revolves around whether prejudice to one or more such defendants may result therefrom. As pointed out in Appellants' brief (pp. 40-42), that prejudice was real and found itself into the District Court findings. The government does

not dispute this reality and, hence, cannot sincerely claim that its intentional misjoinder did no harm to Appellants.

C. The Mis-assignment Of This Case As "Related" To Another One Violated The Local Rules Of The District Court.

Appellee's brief contends that, since the legal issues in this case are similar to those in CAB v. Aeromatic, et al., 489 F. 2d 251 (2nd Cir. 1973), the non-random selection of the same judge was entirely appropriate. That is not the rule in the United States District Court for the Eastern District of New York. It is not sufficient that the legal issues be the same. There must be a "...similarity of facts and legal issues." (emphasis supplied). The conjunction is ignored by the government.

Appellants do not claim that they are entitled as a matter of law not to be assigned a particular judge (Appellee's br. p. 41). Appellants do claim that they were entitled to a random selection of a judge and that the failure of the District Court to follow its own rules caused prejudice. (Appellants' br. pp. 43-44).

IV. CONCLUSION

For all the reasons stated herein, Appellants respectfully request this Court to reverse the decision of the court below.

Respectfully submitted,
/s/ Howard S. Boros
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January 6, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of January, 1975, served the foregoing brief on Appellee by causing copies thereof to be hand delivered to these persons:

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January 5, 1975

Clerk
U.S. Court of Appeals
Foley Square
New York, New York

Re: C.A.B. v. Carefree et al., No. 74-24-31

Dear Sir:

Enclosed are 25 copies of Appellant's Reply Brief.

Pursuant to the court's recent Order, we are also delivering copies of the Brief to the chambers of each judge on or before 11:00 a. m.

Also enclosed are an original and three (3) copies of Appellant's Motion to Strike. Copies of the Brief and the Motion are being served as per their certificates of service.

Appellants respectfully request to be allotted 30 minutes for oral argument. This is made necessary by the complexity of the legal and factual issues in the case.

Sincerely yours,

Howard S Boros

Howard S. Boros
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Enclosures

HSB:meb